CHEONG JAK KIM

v.

BORNEO INSURANCE LTD.

HIGH COURT, BRUNEI
DENYS ROBERTS CJ
[CIVIL SUIT NO. 351 OF 1984]
5 & 6 AUGUST 1987

LABOUR LAW: *Employment - Contract of employment - Period of notice for termination of services not specified - Whether reasonable notice had been given - Construction of contract - Whether employee entitled to use of a car.*

CONTRACT: *Agency agreement - Whether agent bound to pay outstanding insurance premiums to principal.*

The plaintiff's service as general manager was terminated by the defendant by giving him one month's salary in lieu of notice. The contract of employment was silent as to the period of notice to be given. When he was employed in a lower position as marketing manager the period of notice was specified as three months. The plaintiff also claimed damages for the failure of the defendant to provide him with the use of a car. The plaintiff contended that contract provided that if he achieved the stipulated sales target within the specified period, he would be entitled to use of a car. In the counter claim it was claimed *inter alia* that the plaintiff had to pay outstanding premiums on policies for which he had issued cover notes.

Held:

[1] In absence of a contractual provision, reasonable notice had to be given for termination of services. The plaintiff was entitled to three months notice as he was employed in a senior position.

[2] From the construction of the contracts, the plaintiff was entitled to the use of a car as he had achieved the stipulated sales target within the specified period. The plaintiff was entitled to damages and he could claim for expenses incurred in using his car.

[3] The plaintiff had entered into agency agreement with the defendant to sell insurance policies. The plaintiff has to collect all outstanding of insurance premiums as he was bound by the agreement to pay the sums stated in the monthly statement of accounts which the defendant had issued to him.

[Plaintiff's claim allowed with costs. Counter claim allowed with costs.]

Case referred to:
Pilkington v. Wood [1953] Ch

Legislation referred to:
Contracts Act [Brunei], s. 57(2)

Other source referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 25, p. 490

For the plaintiff - David Clidero; M/s David Clidero & Co.
For the defendant - Mdm Norila Abu Hassan; M/s. D F Abang Zen

JUDGMENT

Denys Roberts CJ:

The plaintiff was employed by the defendant the Borneo Insurance Limited from December 1980 until 30 June 1982 as marketing manager. He resigned on the latter date after giving one month's notice. Nevertheless he continued thereafter to be employed by the defendant as an independent agent until he was reengaged by the defendant as general manager with effect from 1 May 1983.

The terms and conditions of that employment were set out in two letters dated 16 and 29 April 1983. Both were signed by Mr. K.H. Ang the then managing director of the defendant. The plaintiff continued to be employed in that capacity until 24 April 1984 when the defendant terminated his contract, by letter bearing that date, giving him one month's salary in lieu of notice. On 5 May 1984, the defendant caused a notice to be published in the Borneo Bulletin, announcing that "Mr. Cheong Jak Kim had ceased to be employed by our company and he has no authority to transact any business or collect any monies on behalf of the company"; underneath appeared the words "Borneo Insurance Limited". Against that background I turn to the claims put forward by the plaintiff.

Claims for salary in lieu of notice

First of all I will deal with his claim for 2 months' additional salary in lieu of notice. The plaintiff argues that he was entitled to three months' notice of the termination of his agreement, or salary in lieu. His contract as general manager is silent as to the period of notice to be given. In his earlier contract however, dated 17 December 1980, when he was engaged as marketing manager, a period of 3 months notice was required, or 3 months salary in lieu. Mr. Ang, who was the managing director of the defendant until October 1983, gave evidence that 3 months was the usual length of notice for senior staff. Mr. Lim Teck Lee in evidence said that this practice had changed since Mr. Ang left, though this was some months after the plaintiff was engaged as general manager. I was referred to the Labour Act (Cap. 93) which provides for a period of notice of termination of an agreement not exceeding 1 month. That Act however, is applicable only to those defined in the Act itself as workers, that is to say in effect manual workers and those performing similar tasks including domestic staff. It is not intended to cover executive and managerial staff.

The common law is that, in the absence of custom or stipulation, reasonable notice is required. Vol. 25 of the 3rd Edn. of *Halisbury's Laws* at p. 490, to which Mr. Clidero has referred me, contains many cases which suggest that more senior employees are entitled, in the absence of any specific provision in their contracts, to a longer period of notice than junior employees.

One month's notice would no doubt be entirely proper for junior employees employed on a month to month basis, but for more senior employees, who after all are likely to find it harder to sell their skills in the market, a longer period is to be expected. I have no doubt that, if the matter had been canvassed at the time when Mr. Chong's contract was concluded in 1983, a period of 3 months' notice would have been included in his contract. I also give weight to the fact that, in a contract with the same company about 2 years before, 3 months' notice had been required, when he occupied a more junior position. I conclude therefore that a proper length of notice under the contract would have been 3 months and that the plaintiff is entitled to a further 2 months salary, which amounts to $7,000, in addition to the sum of $6,194 which was due to him by way of salary and other sums on 24 April 1984.

Provision of a car

I turn now to the claim by the plaintiff for damages for the failure of the defendant to provide him with the use of a car in accordance with the contract. Clause 5 of the letter of 16 April reads as follows:

> A car will be given to you within 6 months if you reach the target sales of new business of $100,000 gross premium. However, you must undertake to ensure that you maintain and improve the production after the car is given to you.

It is not disputed by the defendant that, in the 6 months period May to October 1983, the plaintiff secured new business for the defendant attracting a total gross premium of $167,109.61. The plaintiff contends that he was thus entitled to a car, in accordance with Clause 5 of the letter, from the beginning of October 1983. Although he asked for the car, it was not provided. He was therefore obliged to continue to use his own car and seeks to recover the cost of doing so.

In principle I have no doubt that he is so entitled as a proper measure of the damages which he suffered by reason of the defendant's breach of contract, if that is established. The defendant argues that Clause 5 of the agreement meant that the plaintiff must reach a gross total premium of new business of $100,000 per month, not $100,000 in the period of six months. The wording of the clause has no reference to any period other than 6 months, and it leaves no doubt in my mind that the precondition of the supply of a car to the plaintiff was that he should achieve a total of $100,000 worth of new business within a period of 6 months.

Mr. S.L. Lim, the marketing manager and company secretary of the defendant, testified that the Board of Directors intended the clause to require the plaintiff to meet a target of $100,000 a month. He admits however, that a memo of 8 December 1983, which he wrote on the instructions of the Board, drawing the plaintiff's attention to the fact that he had not met a target of $100,000 a month, was issued because, as he put it, the memo of 16 April was "not written clearly". He further conceded that, in the business experience of the company, a $100,000 total premium in 6 months would be quite normal. He also agreed that the performance of the plaintiff was thought by the Board in December to be "okay". It is difficult to see how they could have held that view if the plaintiff have been bound to produce $100,000 worth of new business a month, but had only managed, during his first six months as general manager, an average of about $28,000 a month.

Mr. Lim Tat Lee, the present assistant managing director of the defendant, admitted in evidence that his best agents achieved about $40,000 worth of business a month and that the defendant had never had an agent who had managed $100,000 in a month.

The plaintiff was in no doubt that he had to produce $100,000 worth of business in 6 months. He says, and I accept it, that nobody complained about his performance during that period, as they would have done if his production of $28,000 a month had fallen so far below a target of $100,000 a month.

Mr Ang, who was the managing director until October 1983, was present at the meeting of April 1983, at which the terms of the plaintiff's agreement was discussed with the directors. His evidence was that the clause was intended to require the plaintiff to generate $100,000 worth of premiums in the first 6 months. I accept his evidence as to this. I thus have no doubt that Clause 5 required the plaintiff to produce $100,000 total premiums in 6 months, as the natural meaning of the clause requires. I am sure that both parties intended that clause to be so construed and I reject the evidence of Mr. S.L. Lim to the contrary.

As far as damages are concerned, I accept that these should be assessed on the basis of a period of 5 months, from 1 November 1983 until 24 April 1984, when his contract was terminated, less than 2 weeks period when he took leave in March 1984.

Cost of the car

The plaintiff claims the expense of petrol for the running of his car for 2 return trips a week to Kuala Belait from Bandar Seri Begawan and for other business calls involving a similar mileage. His contract required him to make 1 or 2 trips a week to Kuala Belait and to visit all the other active agents at least once a month. The mileage figures that he put forward seem to me to be reasonable. He based his claim on petrol consumption at 18 miles per gallon at $2.25 a gallon, a total of about $320 a month.

It was suggested that his own car, which was a second hand Mercedes 250, was unnecessarily large for the work which he was doing for his status and that he could not have expected that the defendant should provide so expensive car under the contract. However that may be, the defendant failed to provide any car and the plaintiff took what appears to me to be the only reasonable and sensible step of continuing to use his own vehicle rather than adopting the alternative, which would have been to hire one and charge the defendant with the risk of not having the money refunded.

I have rather more difficulty in dealing with the claim of the plaintiff for $650 a month for tyres and maintenance, which, when he gave evidence, he seemed to have increased to $1,000 a month. No vouchers were produced to support this figure and very little evidence of it was given.

However, the plaintiff is entitled to something for the up-keep of his car when used on company business, although not what he claims. I decided to adopt a somewhat rough and ready formula, which is widely used. It is well known that government officers receive a mileage allowance for the use of their vehicles on official business. This allowance covers not only petrol but maintenance and depreciation. It doesn't vary with the size of the car. It amounts to 72¢ a mile for the first 140 miles travelled in any month, and 22¢ a mile thereafter. The plaintiff claims 8 return trips a month to Kuala Belait, that is 8 x 140 miles, which is 1120 and a similar distance for the other travelling, a total of 2240 miles a month.

72¢ on the first 140 miles gives $100.80¢ and 22¢ on the other 2100 gives $462. I round this up to $570 a month, multiply that by 5 giving $3,040. So the plaintiff is entitled to succeed in his claim for $13,195 and $3048 a total of $16,235. He would be entitled to interest on that sum at 6% from 1 May 1984 to today.

Counterclaim

I now turn to the defendant's counterclaim. There is no dispute with regard to the balance of the loan made by the defendant to the plaintiff in September 1983. It is conceded that there remains outstanding in relation thereto a balance of $6,345. The defendant is entitled to judgment for this amount plus interest at 6% from 1 June 1984 to today at 6%.

The main item in controversy is the defendant's counterclaim for $77,576.51, by way of premiums outstanding, at 31 July 1984, on policies for which the plaintiff had issued cover notes. Throughout his employment with the defendant, as I have mentioned before, the plaintiff remained active as an agent for the sale of policies on behalf of the company, in addition to whatever other duties he may have been performing for it. There appears to have been some slackness in the administration of the company during its early years so that employees were apparently acting as agents without having been obliged to sign a proper policy agreement.

However that may be, the plaintiff did sign an agency agreement on 15 December 1983. The plaintiff sought to explain his willingness to sign this document, and perhaps to evade the consequences of doing so, by testifying that, when he signed it on 15 December Mr. Lim told him "You do not have to worry. This is just a procedure to get things done." He added that Mr. Ang had earlier told him that that kind of agreement did not apply to employees, though Mr. Ang's evidence did not support that. Mr. Lim denies making any such remark to the plaintiff and added that it was the standard form signed by all agents and that, as general manager, the plaintiff must have been familiar with it. In this respect I accept Mr. Lim's evidence.

The important clause is in the agency agreement Clause 8, which is called "settlement of accounts" and reads as follows:

> It is mutually understood and agreed that the company shall forward to the Agent its monthly statements covering all business transacted by the Agent for the company. The Agent shall within 14 days from the receipt of the monthly statements give written notice to the company of the items disputed by the Agent in such monthly statements. If the company does not receive from the Agent written notice of discrepancies prior to the due date of the outstanding premium, the company shall assume that the balance due is confirmed as correct by the Agent; every such monthly statements of accounts shall at all times thereafter be binding and conclusive upon the parties and shall not afterwards be opened and questioned by the Agent, and the Agent shall then be fully responsible to the company for all net premiums due according to the statements. The Agent shall pay in full all such balances due as shown by the said statements within the credit period stipulated in the Schedule hereto without any demand from the company.

The schedule shows that the credit period is 30 days, which means that the premiums which were shown in a monthly statement as due to the company must be paid within 30 days of the date of the transaction. Unless the agent has challenged a statement within 14 days of receiving it, the company is entitled to assume the balance to be correct and the agent becomes responsible for the payment of the balance.

It was not suggested in evidence by the plaintiff that any of the accounts produced in evidence and covering the period November 1982 to July 1984 had been challenged by him and he conceded that, by the end of July 1984 the amount of $77,576.51 was outstanding for premiums due on policies which he had secured for the company. He admitted that, after he had left the company, he had taken no steps to collect these outstanding sums from any of the clients to whom he had issued cover notes.

I should make it clear that it is not suggested that he has behaved dishonestly. There is no allegation that he collected any premiums and put them into his own pocket without accounting for them, though he conceded that he failed to pursue the premiums which were owned by his clients.

On the face of it therefore, the plaintiff seems to have no answer to the claim against him for the outstanding premiums, in view of the provisions of Clause 8 of the agency agreement which he signed. However, it was argued on his behalf that the placing of the notice in the Borneo Bulletin on 5 May 1984, both prevented him from collecting any further premiums on behalf of the company under the agency agreement, and also relieved him of his obligations under the agency agreement of 15 December 1983 which made him responsible for the payment of those premiums which were contained in the monthly statements which he was deemed to have approved.

I am prepared to accept the notice of 5 May as being of some limited assistance to the plaintiff. The schedule to the agency agreement allows for a 30 day credit period, and I think it would be reasonable to find that the effect of the notice of 5 May was such that it became so difficult in practice for the plaintiff to continue to collect premiums that it would not be reasonable to expect him to have attempted to do so. Consequently, I would not have expected him to be able to collect any premiums for which the credit period had not expired at the time of the publication of the notice. This means that I would discount in his favour the amount of any premiums which appeared for the first time in any statement after that dated 31 March 1984. But I do not consider that he should be relieved of liability for those premiums which he should have collected before the notice at the expiry of the credit period. Mr. Lim gave evidence that it was common for agents to be allowed 60 or even 90 days, instead of the 30 days provided in the Agency Agreement, to collect premiums. So, it was argued, this practice created a form of equitable estoppel, that is to say that the defendant is prevented from recovering from the plaintiff until 90 days after the debt was incurred.

However, there was no evidence given by the plaintiff himself to support such a proposition. He did not suggest that he had relied on this practice as a justification for not securing the payment of premiums within 30 day period provided for in the agreement. He did not suggest that, were it not for this custom, he would by 5 May have collected all the premiums which had been outstanding for more than a month but because of it he had only collected those due for over three months.

As an alternative argument, it was said that s. 57(2) of the Contract Act would apply, so as to render the agency agreement void. That sub-section reads "a contract to do an act which after the contract is made becomes impossible becomes void when the act becomes impossible". This section only applies where a contract is entered to do an act which is impossible. In this instance the act had been completed and the action is to recover damages for a breach of the contract to which effect has been given.

A further argument was that the defendant should fail because it had not taken proper steps to mitigate the damages which it had suffered. It would in my view, and this is strengthened by *Pilkington v. Wood* [1953] Ch that it would be extending the doctrine of mitigation far beyond its accepted bounds to require a party who has alternative claims against two defendants to sue the other one instead of pursuing his remedy against the first. I do not consider that the failure of the defendant to take any steps to recover the premiums, against the various insured persons affects the liability of the plaintiff.

At the end of March 1984 $72,625.86 was due by way of outstanding premiums. On the basis which I have suggested, the premiums for April and May 1984 would not be added to this. And I would deduct, from the $72,625.86, payments made by the plaintiff to the defendant in April, May and June, 1984, amounting to $9,196.10.

This leaves a balance of $63,429.76, for which I gave judgment on the counterclaim, with 6% interest from 1 May 1984, The plaintiff shall have the costs of the claim and the defendant the costs of the counterclaim.

Also found at [1988] 1 CLJ 856